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No. 05-9264

IN THE

Supreme Court of the United States

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
I. RESPONDENT'S INTERPRETATION OF THE ACCA VIOLATES BASIC RULES OF STATUTORY CONSTRUCTION	2
A. Congress Intentionally Omitted Attempt Crimes From § 924(e)(2)(B)(ii)	3
B. Respondent's Interpretation Of § 924(e)(2)(B)(ii) Is Untenable	5
C. The Legislative History Of The ACCA Further Shows That § 924(E)(2)(B)(Ii) Does Not Encompass Attempt Crimes	6
D. Post-ACCA Constructions Of Other Sentencing Provisions Are Irrelevant	7
II. RESPONDENT'S INTERPRETATION OF THE ACCA IS ILLOGICAL AND LEADS TO ABSURD RESULTS	9
III. RESPONDENT MISUNDERSTANDS FLORIDA LAW OF ATTEMPTED BURGLARY	13
IV. FLORIDA'S DEFINITION OF BURGLARY TO INCLUDE CURTILAGE FURTHER UNDERCUTS RESPONDENT'S ARGUMENTS	15
V. RESPONDENT'S INTERPRETATION OF THE ARMED CAREER CRIMINAL ACT RAISES SERIOUS CONSTITUTIONAL QUESTIONS	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 18
Baker v. *State*, 636 So. 2d 1342 (Fla. 1994) 15
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 5
Chevron, U.S.A. v. *Echazabal*, 536 U.S. 73 (2002) 4
Dunbar v. *Jackson Hole Mountain Resort Corp.*, 392 F.3d 1145 (10th Cir. 2004) 18
Duncan v. *Walker*, 533 U.S. 167 (2001) 9
Franklin v. *Gwinnett County Public Schs.*, 503 U.S. 60 (1992) 8
Garcia v. *United States*, 469 U.S. 70 (1984) 5
Garner v. *Louisiana*, 368 U.S. 157 (1961) 5
Gooch v. *United States*, 297 U.S. 124 (1936) 6
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 5, 10
Jones v. *State*, 608 So. 2d 797 (Fla. 1992) 13, 14
Katz v. *United States*, 389 U.S. 347 (1967) 17
Kyllo v. *United States*, 533 U.S. 27 (2001) 17
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 11
Mercer v. *State*, 347 So. 2d 733 (Fla. 4th Dist. Ct. App. 1977) 15
Mistretta v. *United States*, 488 U.S. 361 (1989) 19
In the Interest of M.M., 571 So. 2d 112 (Fla. 4th Dist. Ct. App. 1990) 14
Payton v. *New York*, 445 U.S. 573 (1980) 17
Richardson v. *State*, 922 So. 2d 331 (Fla. 4th Dist. Ct. App. 2006) 11
Russello v. *United States*, 464 U.S. 16 (1983) 3, 4, 5
Shepard v. *United States*, 544 U.S. 13 (2005) 1, 18
State v. *Hamilton*, 660 So. 2d 1038 (Fla. 1995) 15
Taylor v. *United States*, 495 U.S. 575 (1990) 1, 7, 11, 15
Tennessee v. *Garner*, 471 U.S. 1 (1985) 10, 11

TABLE OF AUTHORITIES—continued

	Page
Thomas v. *State*, 531 So. 2d 708 (Fla. 1988)	13
United States v. *Booker*, 543 U.S. 220 (2005)	18
United States v. *Doe*, 960 F.2d 221 (1st Cir. 1992)	8, 9
United States v. *Golden*, No. 06-1326, 2006 WL 3019464 (7th Cir. Oct. 25, 2006)	13, 18
United States v. *Hargrove*, 416 F.3d 486 (6th Cir. 2005)	12
United States v. *Lanier*, 520 U.S. 259 (1997)	20
United States v. *Matthews*, No. 05-13447, 2006 WL 2884040 (11th Cir. Oct. 12, 2006)	16
United States v. *McCall*, 439 F.3d 967 (8th Cir. 2006)	18
United States v. *Plunta*, 144 F.3d 968 (6th Cir. 1998)	16
United States v. *Taylor*, 413 F.3d 1146 (10th Cir. 2005)	18
United States v. *Wade*, 458 F.3d 1273 (11th Cir. 2006)	13
Webber v. *State*, 718 So. 2d 258 (Fla. 5th Dist. Ct. App. 1998)	15
Willheim v. *Murchison*, 342 F.2d 33 (2d Cir. 1965)	9

STATUTES

18 U.S.C. § 16(b)	11
§ 33(a)	4
§ 844(i)	5
§ 924(e)(2)(B)(ii)	1
§ 994	8
§ 1031(a)	4
§ 1201	4
§ 2117	4
§ 2118	4

TABLE OF AUTHORITIES—continued

	Page
18 U.S.C. § 2332b(a)(1)(B)	19
Ala. Code § 13A-6-24(a)	19
Alaska Stat. § 11.41.250(a)	19
§ 11.61.150(a)(1)	19
Ariz. Rev. Stat. § 13-1201	19
§ 13-2508	19
Cal. Health & Safety Code § 42400.3.(b)	19
Fla. Stat. § 777.04(1)	11, 13
§ 810.07(2)	14
§ 812.014(2)(c)1	12
§ 832.05	12
§ 1006.135(3)	19
N.Y. Penal Law § 120.20	19
§ 145.45	19
§ 490.47	20

LEGISLATIVE HISTORY

H.R. Rep. No. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661	11

SCHOLARLY AUTHORITY

William Blackstone, 4 *Commentaries*	16

OTHER AUTHORITIES

Florida Standard Jury Instructions In Criminal Cases (3d ed. 1981)	14
USSG § 1A1.1	8
USSG § 4B1.1(b-c)	8
USSG § 4B1.2	8
USSG § 4B1.4 cmt. n.1	8
USSG app. C amend. 268	8
Webster's Third International Dictionary (1993)	9

REPLY BRIEF OF PETITIONER

Respondent's brief in support of the Eleventh Circuit's holding that *all* attempted burglaries qualify as "violent felonies" for purposes of the imposition of a minimum 15-year mandatory sentence under the Armed Career Criminal Act ("ACCA") suggests that this Court adopt a rule that is breathtaking in its scope. The logical conclusion of Respondent's argument is that all prior felonies could become violent felonies under the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii) where a sentencing court determines, based solely upon its "commonsense" and "experience," that such a felony presents a serious potential risk of injury to another. Resp. Br. 43. Such a radical expansion of the scope of the ACCA is wholly contrary to the language of the statute, its structure and its history. It is also wholly contrary to the Court's unequivocal and repeated prescriptions for interpreting the ACCA in both *Shepard* v. *United States*, 544 U.S. 13 (2005) and *Taylor* v. *United States*, 495 U.S. 575 (1990). And further, it is contrary even to the arguments that Respondent previously offered to this Court in successful support of its position in *Taylor*. Accordingly, Respondent's suggested rule must be rejected.

There is nothing crabbed or narrow about the competing rule offered by Petitioner. The ACCA's language and structure is logical and specific. Section 924(e)(2)(B)(i) encompasses, expressly, any prior felony that "has as an *element* the ... attempted use, or threatened use of physical force against the person of another." *Id.* (emphasis added). The following subsection, § 924(e)(2)(B)(ii), also specifies certain completed "property" crimes, including burglary, but nowhere specifies that attempts or threats against such property are included. The last clause of that subsection ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is properly read, per the maxims of statutory construction and *Taylor* and *Shepard*, to encompass a broad range of property crimes that nonetheless

have as an *element* the endangerment of others. On this reading, the ACCA is broad in scope, yet true to its language, origins and this Court's holdings.

Respondent's proposed interpretation of the "otherwise" clause does violence to the integrity of the statute and would have sentencing courts legislate the elements of ACCA convictions. The consequences of Respondent's suggested rule is that sentencing courts may find any felony to be an ACCA predicate based on nothing more than a subjective judgment that such crimes tend to pose a risk of physical injury. Because the only limiting principle Respondent offers is the "common[ ]sense" and "experience" of well-meaning jurists, Respondent's position unavoidably would result in irreconcilable interpretations of the risk inherent in certain crimes. To invite such an interpretive patchwork is especially inappropriate where the stakes are so terribly high—here, the ACCA's minimum 15-year mandatory sentence.

I. RESPONDENT'S INTERPRETATION OF THE ACCA VIOLATES BASIC RULES OF STATUTORY CONSTRUCTION.

Respondent has now abandoned its argument before the Eleventh Circuit that an attempted burglary is an enumerated "burglary" under § 924(e)(2)(B)(ii). See Reply Br. of Cross-Appellee United States 16-19 (arguing that term "burglary" includes attempted burglaries). The only remaining question, therefore, is whether attempted burglaries fall within the "otherwise" clause of § 924(e)(2)(B)(ii) as crimes that "involv[e] conduct that presents a serious potential risk of physical injury to another." As Petitioner explained in his opening brief, the "otherwise" clause must be interpreted within the context of the surrounding statute, which strongly indicates that § 924(e)(2)(B)(ii) was not intended to encompass attempt crimes. Respondent, on the other hand, claims that the "otherwise" clause is a broad mandate for courts to use their "common[ ]sense" to identify which crimes they believe are sufficiently risky—indeed, Respondent

contends that the other crimes defined in § 924(e)(2)(B)(ii) are nothing but superfluous examples. Resp. Br. 43. Respondent's interpretation is at odds with Congress' language and the legislative history, creates grave constitutional doubt, and—even if correct—would not justify a conclusion that a Florida conviction for attempted burglary "involves conduct that presents a serious potential risk of physical injury to another."

A. Congress Intentionally Omitted Attempt Crimes From § 924(e)(2)(B)(ii).

Respondent simply has no effective answer to the most relevant statutory evidence of whether Congress intended § 924(e)(2)(B)(ii) to encompass attempt crimes: the fact that Congress explicitly *provided for* attempt crimes in § 924(e)(2)(B)(i) and explicitly *omitted* attempt crimes in § 924(e)(2)(B)(ii). The stark contrast between these sequential clauses is the clearest possible indication that Congress did not intend § 924(e)(2)(B)(ii) to include attempt offenses. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (alteration in original); see Pet. Br. 18 (citing *Russello*).

Respondent offers no reason why a *Russello* presumption should not apply here (indeed, its brief does not even bother to cite *Russello*). Instead, Respondent pretends that Petitioner "invoke[d] the cannon [sic] of *expressio unius est exclusio alterius*," and directs its argument at that straw man. Resp. Br. 31. Respondent misstates Petitioner's argument, which never relied on the *expressio unius* presumption that arises when an "associated group or series" omits an element that would ordinarily be listed, but instead on the presumption that Congress' decision to include language in one part of an Act and omit it in another indicates a conscious omission.

Compare *Chevron, U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002), with *Russello*, 464 U.S. at 23. In arguing that *expressio unius* ought not to apply, Respondent heavily relies on the fact that subsections (i) and (ii) set forth different "criteria" for crimes to constitute violent felonies. Resp. Br. 32. But that is precisely the point. Congress established two criteria for "violent felonies" and "'include[d] particular language'" in § 924(e)(2)(B)(i) while omitting it *in the very next clause*. *Russello*, 464 U.S. at 23. This direct juxtaposition creates a powerful presumption that Congress' omission was intentional.

Curiously, Respondent claims that its interpretation is supported by the fact that Congress often specifies that attempts and completed crimes should be punished similarly. See Resp. Br. 18-19 (arguing that there is a "general rule that attempts and completed crimes are punished identically in the United States Code"). It is certainly true that, when Congress intends to punish attempted crimes, it does so explicitly. See, *e.g.*, 18 U.S.C. §§ 33(a), 1031(a), 2118. But, as Respondent itself acknowledges, Congress does not always treat attempts and completed crimes the same; in several statutes it specifies different punishments for attempted and completed offenses. See, *e.g.*, § 1201(a), (d) (punishing attempted kidnapping less severely then completed kidnapping). In others it has chosen to punish only the completed offense. See, *e.g.*, § 2117. The only "general rule" that can be derived from this disparate treatment of attempts is the rule that Congress treats attempts differently in different statutes and the only way to divine Congress' intent is to apply the words it uses. Here, where Congress explicitly included "the attempted use of force" in § 924(e)(2)(B)(i) and failed to include similar "attempt" language in § 924(e)(2)(B)(ii), Congress has indicated clearly that attempt offenses were not to be encompassed in § 924(e)(2)(B)(ii).

B. Respondent's Interpretation Of § 924(e)(2)(B)(ii) Is Untenable.

In Respondent's view, the "otherwise" clause of § 924(e)(2)(B)(ii) controls the entire subsection. The four specific crimes enumerated in § 924(e)(2)(B)(ii) are deemed to be nothing more than "examples" of the "expansive" last clause of the statute. Resp. Br. 32. This tortured interpretation of Congress' language is wrong for several reasons. First, it would make each of these supposed "examples" superfluous—"a result [this Court] eschew[s] in statutory interpretation." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 190 (2005). Moreover, Respondent ignores the fundamental principle that, where specific terms precede a general term in a statute, those specific terms limit the reach of that general term, and are not to be treated as mere "examples." See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001). To reason, as Respondent does, that specific statutory terms should be treated as subordinate examples to the general term that they precede would turn this Court's *ejusdem generis* jurisprudence on its head. See, *e.g.*, *id.* (applying *ejusdem generis* to interpret general provisions in light of preceding specific terms, and not vice versa); *Garcia* v. *United States*, 469 U.S. 70, 71 (1984) (same); *Garner* v. *Louisiana*, 368 U.S. 157, 167-68 (1961) (same).[1] If

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[1] As Petitioner argued in its initial brief, because § 924(e)(2)(B)(ii) only enumerates completed offenses, *ejusdem generis* dictates that the "otherwise" clause encompass only completed offenses. Pet. Br. 18-19. Respondent does not contest that the "burglary," "arson," and "extortion" referred to in § 924(e)(2)(B)(ii) are completed offenses, but instead hypothesizes that an attempt crime could involve the "use of explosives." Resp. Br. 33 n.14. But Congress' use of the term "use of explosives" (and not "attempted use of explosives") coupled with § 924(e)(2)(B)(i)'s explicit inclusion of attempt crimes definitively establishes that Congress intended the term to reach only completed offenses. *See Russello*, 464 U.S. at 23. Moreover, the fact that one could be convicted under 18 U.S.C. § 844(i) for attempting to destroy property by means of explosives in no way indicates that such an attempt necessarily would involve the

Congress truly had intended for § 924(e)(2)(B)(ii) to be a broad category illuminated by specific examples, it would have drafted the statute that way: *e.g.*, "The term 'violent felony' means crimes involving conduct that presents a serious potential risk of physical injury to another, including but not limited to burglary, arson, extortion, and crimes involving the use of explosives." Congress' decision instead to adopt a framework that this Court has long held to "limit[] general terms which follow specific ones to matters similar to those specified" demonstrates that it did not intend the final clause of § 924(e)(2)(B)(ii) to have such an expansive meaning. *Gooch* v. *United States*, 297 U.S. 124, 128 (1936).

C. The Legislative History Of The ACCA Further Shows That § 924(E)(2)(B)(Ii) Does Not Encompass Attempt Crimes.

If any more support were needed to supplement the overwhelming textual evidence that attempted burglaries are not encompassed by § 924(e)(2)(B)(ii), the legislative history provides it. When Congress enacted the ACCA in 1984 it rejected language that would have made attempted burglary an ACCA predicate. See Pet. Br. 19-20. Respondent appears to concede that the 1984 version of the ACCA would not have encompassed attempted crimes, see Resp. Br. 34, but claims that the 1984 legislative history is irrelevant because when Congress reenacted the ACCA in 1986 "it sought broadly to expand the category of violent felonies" and therefore could not have meant to "exclud[e] attempt crimes." *Id.* at 35-36 (emphasis omitted). First, Respondent misunderstands Congress' intent in 1986. While Congress did not hesitate to "expand" the ACCA to cover serious drug offenses and the inherently violent predicate offenses encompassed by § 924(e)(2)(B)(i), it balked at similarly expansive language for property crimes, specifically language

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"use of explosives." One can imagine many scenarios in which an individual took a substantial step or made an overt act sufficient to establish a criminal attempt without "using" any explosives.

that would expand the definition of violent felonies to reach all felonies that "'involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *Taylor*, 495 U.S. at 583 (quoting H.R. No. 99-4639 (1986)). This language "was seen as too broad," and Congress instead chose to adopt the current, narrower definition. *Id.* at 586. More importantly, in expanding the number of predicate offenses, Congress never abandoned the element-based approach it adopted in 1984. *Id.* at 590 ("Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using *uniform, categorical definitions* to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof ....") (emphasis added).[2] And the United States does not point to a shred of legislative history evidence that the 1986 amendments were intended to reach attempted property crimes.[3] In short, Congress' decision to add to the list of offenses that categorically qualify as ACCA predicates in no way signifies an intent that the fundamental canons of *Russello* and *Circuit City* should be abandoned when construing § 924(e)(2)(B)(ii).

D. Post-ACCA Constructions Of Other Sentencing Provisions Are Irrelevant.

Respondent heavily relies on the United States Sentencing Commission's construction of the career offender enhancement, but this is of no moment to the meaning of the

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[2] Respondent has recognized (correctly) that the 1986 version of the ACCA "was designed to preserve the status quo from the 1984 Act with respect to the offense of burglary." Brief of United States, *Taylor* v. *United States*, 495 U.S. 575 (filed Dec. 29, 1989), *available at* 1989 WL 1126976, at *27.

[3] *Cf.* Brief of United States, *Taylor*, 1989 WL 1126976, at *32 ("It is highly unlikely that Congress would have endorsed such a radical change in its approach to the enhancement provisions of the Armed Career Criminal Act without leaving any evidence whatsoever of its intention to do so").

ACCA. Resp. Br. 17-18. The Sentencing Commission made it very clear that its interpretation of the career offender sentencing enhancement provision was not an interpretation of the ACCA. See USSG § 4B1.4 cmt. n.1 ("The term[] 'violent felony' [is] defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definition[] of 'violent felony' ... [is] not identical to the definition[] of 'crime of violence' ... used in § 4B1.1 (Career Offender)").[4] Furthermore, the Sentencing Guidelines themselves were not effective until November 1987—*after* the ACCA was passed in its current form. *Id.* § 4B1.2. The Sentencing Commission's interpretation of the career offender enhancement to include attempts dates from November 1989. USSG app. C amend. 268. These post-ACCA interpretations of a different sentencing provision are completely irrelevant as to what Congress intended in 1986 when it enacted the current version of the ACCA. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 61 (1992). Moreover, the Sentencing Commission has the discretion to use policy judgments when it interprets Guidelines. See USSG § 1A1.1; see also 18 U.S.C. § 994 (describing the policy factors weighed by the Sentencing Commission in designing the Guidelines). Courts construing criminal statutes do not have such discretion—they must apply the statute that Congress wrote and cannot extend it "simply because a court may think this a good idea."[5]

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[4] Designation as a career offender for sentencing has considerably less serious practical consequences than being convicted as an armed career criminal under the ACCA. While an ACCA conviction increases both the mandatory minimum and statutory maximum sentences, career offender status alters neither. And while an ACCA conviction carries a mandatory minimum sentence of 15 years in prison, a career offender designation can result in an enhanced sentence of as little as 30 months, depending on the nature of the underlying offense. *See* USSG § 4B1.1(b-c).

[5] Respondent's reliance on *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992), is unavailing. *Doe* cited Sentencing Commission commentary as but one of several rationales supporting its interpretation of the ACCA—first and foremost of which was its conclusion that the plain

Willheim v. *Murchison*, 342 F.2d 33, 42 (2d Cir. 1965) (Friendly, J.).

II. RESPONDENT'S INTERPRETATION OF THE ACCA IS ILLOGICAL AND LEADS TO ABSURD RESULTS.

Even accepting the Respondent's argument that the "otherwise" clause of § 924(e)(2)(B)(ii) could encompass attempted crimes, Resp. Br. 42, attempted burglaries under Florida law are not crimes that create a "serious potential risk of physical injury to another." According to Respondent's logic, all attempted burglaries are violent felonies because "all completed burglaries of a dwelling pose a serious risk of physical injury, and all attempted burglaries therefore pose a 'serious *potential* risk' of such injury." Resp. Br. 14-15.[6] Neither premise is correct.

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language of § 924(e)(2)(B) did not cover convictions for felony possession of a firearm. *Id.* at 225. Nothing in *Doe* suggests that Sentencing Commission commentary is a license to ignore the statute's language.

[6] Respondent's selective emphasis of the word "potential"—and not the word "serious"—is telling. Congress' use of the modifier "serious" demonstrates that the "risk" envisioned by the "otherwise" clause must be a substantial one. *See Webster's Third International Dictionary* 2073 (1993) (defining "serious" as "weighty, difficult," "important, significant," and "such as to cause considerable distress, anxiety, or inconvenience: attended with danger"). It is not enough to hypothesize that physical injury might possibly result from an offense—instead, the offense must necessarily involve a serious potential for such injury. And, Respondent's attempt to read "serious" out of the statute by claiming that its effect is somehow negated by the adjective "potential" is meritless. Arguing that these two terms cancel each out violates the fundamental rule that "a statute ought ... to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). This is particularly so because there is a much more reasonable alternative reading of the statute—that both "serious" and "potential" underscore the fact that the "risk" discussed in § 924(e)(2)(B)(ii) must be a concrete one. *See Webster's Third International Dictionary* 1775

First, Respondent's current position that "all completed burglaries of a dwelling pose a serious risk of physical injury" is squarely inconsistent with its previous interpretation of § 924(e)(2)(B)(ii). In its *Taylor* briefing Respondent recognized that the four enumerated offenses in § 924(e)(2)(B)(ii)—and particularly extortion and burglary—were not offenses that necessarily posed a risk of physical injury. See Brief of United States, *Taylor*, 1989 WL 1126976, at *33 ("[T]he crime of extortion may be committed without any threat or risk of physical injury, yet the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii). The same is true of burglary"). Respondent was correct in 1989 when it recognized that burglary could be committed "without any threat or risk of physical injury," and it is wrong now. *Id.* To hold that all completed burglaries "present[] a serious risk of physical injury" renders § 924(e)(2)(B)(ii)'s inclusion of the term "burglary" meaningless. See *id.* at 32-33. If all completed burglaries pose a serious potential risk of physical injury," then all burglaries would fit within the "otherwise" clause and Congress' specification of "burglary" would have been superfluous. See *Jackson*, 544 U.S. at 190. Moreover, burglary is not a crime that poses a "serious potential risk" of physical injury. On the contrary, burglaries "only rarely involve physical violence." *Tennessee* v. *Garner*, 471 U.S. 1, 21-22 (1985). As the *Garner* Court observed:

> The FBI classifies burglary as a "property" rather than a "violent" crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous.... In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-

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(defining "potential" as "existing in possibility: having the capacity or a strong possibility for development into a state of actuality").

> year period from 1973-1982, only 3.8% of all burglaries involved violent crime.

Id. (internal citations omitted).[7] Indeed, while Congress' original inclusion of burglary in the ACCA was due in part to its concern about the potential for violence, an equal (and arguably greater) concern was its belief that "'[m]ost ... burglaries are committed by career criminals.'" H.R. Rep. No. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3361, 3663; see also Pet. Br. 26 n.20.

Moreover, it cannot be said that attempted burglaries present the same risk as burglaries. Any risk presented by burglary arises from illegal *entry* into a structure; absent entry, there is no "'serious potential risk of physical injury.'" *Taylor*, 495 U.S. at 589. Respondent concedes as much in noting that "'[t]he fact that an offender *enters a building* to commit a crime often *creates the possibility* of a violent confrontation.'" Resp. Br. 14 (emphasis added). Attempted burglaries cannot, therefore, "by their very nature" create a "serious potential risk of physical injury," since attempted burglary by definition does not include illegal entry. See Fla. Stat. § 777.04(1) (providing that attempt crimes require that defendant "fails" in the attempted crime or "is intercepted" before the crime can be completed); *Richardson* v. *State*, 922 So. 2d 331, 333-34 (Fla. 4th Dist. Ct. App. 2006) (reversing attempted burglary conviction where "the evidence could establish only the completed crime of burglary").

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[7] Dicta in *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), indicating that burglary is a crime of violence under 18 U.S.C. § 16(b) does not contradict the *Garner* Court's recognition that burglary ordinarily does not involve violence to persons. Section 16(b)'s definition of "crime of violence" applies to crimes that "involve[] a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense." § 16(b) (emphasis added). While physical force against property is certainly used in most burglaries, physical force against persons is relatively rare. *See Garner*, 471 U.S. at 21-22.

Under Respondent's theory, § 924(e)(2)(B)(ii) would encompass many property crimes that are not inherently violent, on the assumption that discovery of the crime could lead to "a violent encounter" between the criminal and those who might wish to defend their property. Resp. Br. 28 (arguing that the "risk" posed by "attempted burglary" is the risk "that a violent encounter will occur"); *id.* 29 (asserting that burglary carries risk that "the perpetrator's conduct in seeking entry to commit a burglary will *provoke* violence" (emphasis added)).[8] But on this logic nearly any felony could qualify, for the discovery of a felony almost always could lead to a confrontation between the felon and the discoverer. A defendant who commits grand theft by shoplifting a watch creates a possibility of confrontation between the shoplifter and the shopowner—indeed, since the shoplifter would necessarily be *inside* the store at the time, the "risk" of confrontation created by his crime would be greater than the "risk" created by an attempted burglar who failed to enter the store. See Fla. Stat. § 812.014(2)(c)(1) (defining grand theft as theft of property "[v]alued at $300 or more"). An identical risk of potential confrontation could be created by a defendant who writes a check for insufficient funds of $150 or more. See Fla. Stat. § 832.05(2)(b) (defining a worthless check offense as a felony when it involves $150 or more). It is absurd to think that the concluding phrase of Congress' detailed definition of "violent felony" has such an expansive

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[8] Respondent cites no empirical evidence that attempted burglary creates a serious potential risk of physical injury. Instead, Respondent offers only anecdotal evidence—three cases from other jurisdictions in which a defendant was convicted of both attempted burglary and *other* violent crimes. *See* Resp. Br. 20 n.5; *see also United States* v. *Hargrove*, 416 F.3d 486, 494 (6th Cir. 2005) ("it is the government's burden to prove that a defendant qualifies for the mandatory 15-year ACCA enhancement").

scope as to sweep in such fundamentally nonviolent felonies on the theory that they create a risk of violence if discovered.[9]

III. RESPONDENT MISUNDERSTANDS FLORIDA LAW OF ATTEMPTED BURGLARY.

Respondent's claim that Florida law "appears to require more than the Model Penal Code standard" to prove attempted burglary is utterly meritless. Resp. Br. 25. In fact, Florida law allows convictions in a wider array of circumstances than does the Model Penal Code. See Fla. Stat. § 777.04(1) ("[a] person who attempts to commit an offense prohibited by law and in such attempt does *any act* toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt") (emphasis added). Respondent does not (and cannot) contest that Petitioner has accurately characterized Florida's standards for attempt. See Pet. Br. 24-26 & nn. 15-19. Nor can it dispute that the Eleventh Circuit has recognized that Florida's attempt statute is significantly *less* rigorous than the Model Penal Code "substantial step" standard. See *United States* v. *Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006).

Instead, Respondent relies upon a single Florida case—*Jones* v. *State*, 608 So. 2d 797 (Fla. 1992)—to argue that Florida's standard for criminal attempt is not broad in the specific context of attempted burglary. *Jones* relied on *Thomas* v. *State*, 531 So. 2d 708, 709 (Fla. 1988), where a defendant was convicted of possession of burglary tools, but not of attempted burglary. The *Jones* court reasoned that

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[9] Courts accepting Respondent's "confrontation" logic have concluded that even felonies as nonviolent as failing to report to county jail are violent felonies for ACCA purposes. *See, e.g.*, *United States* v. *Golden*, No. 06-1326, 2006 WL 3019464, at *2-3 (7th Cir. Oct. 25, 2006) (holding that two state convictions for failure to report to jail were violent felonies under the "otherwise" clause because police's attempts to arrest the nonreporter might create "the potential for a violent confrontation").

"[the *Thomas* defendant] could not have been convicted of attempted burglary because there had been no overt act directed toward entering or remaining in a structure or conveyance." *Jones*, 608 So. 2d at 799. Respondent mistakenly interprets these words to mean that because the defendant did not arrive at the threshold of the dwelling, he could not be convicted of attempted burglary. Resp. Br. 22-23. But the lack of an act bringing the defendant to the threshold of the property was not, itself, dispositive. Rather, attempted burglary was precluded in *Thomas* because it could not be determined with any specificity which of several nearby dwellings the defendant may have targeted. See *In the Interest of M.M.*, 571 So. 2d 112, 112-13 (Fla. 4th Dist. Ct. App. 1990) (holding that failure to plead and prove ownership is fatal to the state's case in burglary and attempted burglary cases); Florida Standard Jury Instructions in Criminal Cases, Burglary and Trespass (3d ed. 1981) (requiring a jury to find that the defendant "did not have the permission or consent of [person alleged in the indictment or information] ... to [enter][remain in] the [structure] [conveyance] at the time") (second through fifth alteration in original).

Using this mistaken conclusion regarding *Jones*, Respondent attempts to support its reading of Florida law by relying on a Florida evidentiary statute declaring that "[i]n a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of attempting to enter *with intent to commit an offense*." Fla. Stat. § 810.07(2) (emphasis added). This statute, however, does not relate to the "overt act" requirement for criminal attempt.[10] The fact that being caught

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[10] In addressing § 810.07, the Florida Supreme Court has made it clear that "[s]tealth is not an element of burglary. Stealthy entry, together with the absence of owner or occupant consent, is an evidentiary tool with

while trying to sneak into a structure or its curtilage can be used as evidence of an intent to commit an offense therein in no way means that such evidence is necessary to prove the "overt act" required for an offense. On the contrary, attempted burglary can be proven in the same way as other attempts: by proving any act taken toward the commission of an offense.[11]

IV. FLORIDA'S DEFINITION OF BURGLARY TO INCLUDE CURTILAGE FURTHER UNDERCUTS RESPONDENT'S ARGUMENTS.

By treating mere entry onto the curtilage of a structure as a burglary of that structure, Florida's burglary statute punishes acts that would not be crimes under *Taylor's* generic definition of burglary. Compare *Taylor*, 495 U.S. at 599 (defining generic burglary as crimes "having the basic elements of unlawful or unprivileged entry into, or remaining in, *a building or structure*" (emphasis added)), with *State* v. *Hamilton*, 660 So. 2d 1038, 1041 (Fla. 1995) (extending burglary to entries onto curtilage). Respondent contends that "Florida's treatment of curtilage does not undercut the court of appeals' conclusion that attempted burglary of a dwelling under Florida law categorically presents a serious potential

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which to establish prima facie proof of intent to commit an offense." *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994).

[11] A defendant who professed an intention to burgle an office building to an undercover officer could be arrested for attempted burglary when he arrived at the location at the pre-arranged time—the police would not need to wait until he actually attempted to enter the building. *See Mercer* v. *State*, 347 So. 2d 733, 735 (Fla. 4th Dist. Ct. App. 1977). A defendant could similarly be convicted if he broke off the attempt before crossing the curtilage upon sighting a security guard. *See Webber* v. *State*, 718 So. 2d 258, 259 (Fla. 5th Dist. Ct. App. 1998) ("[t]he overt act [was defendant's] arrival at or in the vicinity of the gas station, shortly after the appointed time, with the credit cards in his possession").

risk of injury to another." Resp. Br. 38.[12] This contention relies on Florida's supposedly "narrow[]" definition of curtilage, *id.* at 41 n.18, which requires the presence of a surrounding enclosure. Respondent hypothesizes that a resident will defend their enclosed curtilage "in the same manner that he would protect the dwelling itself." *Id.* at 40. Common sense dictates otherwise. Stealing an apple from a neighbor's backyard, which is "a burglary under Florida's statute," *United States* v. *Plunta*, 144 F.3d 968, 975-76 (6th Cir. 1998), simply does not raise the same concerns of a violent confrontation as a forced entry into a residence. Homes are unique. See William Blackstone, 4 *Commentaries* *223 ("the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity").

Respondent's appeal to Fourth Amendment principles is equally unavailing. Although an individual may have an expectation of privacy in their curtilage, no one could reasonably say that an individual would not have a heightened expectation of privacy in his or her home. It does not stand to reason that the violation of any expectation of privacy will likely be met with violent resistance. Therefore, it is fallacious to contend that "the likelihood of a confrontation between the burglar and a resident [is] no less applicable to the dwelling's curtilage than to the dwelling itself." Resp. Br. 41. Moreover, the Fourth Amendment has no applicability here. The "reasonable expectation of privacy" standard applies in the context of warrantless *government* intrusion.

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[12] It is worth noting that the Eleventh Circuit did not hesitate to hold that—regardless of whether the curtilage provisions of Florida burglary convictions make it a non-generic burglary—all such burglaries categorically pose a "serious potential risk of physical injury to another." *United States* v. *Matthews*, No. 05-13447, 2006 WL 2884040, at *3 (11th Cir. Oct. 12, 2006). By sweeping non-generic burglaries into the "otherwise" clause on the theory that they pose the same risks as a completed generic burglary, the Eleventh Circuit's expansive definition of the "otherwise" clause robs *Taylor* of any significance.

See *Katz* v. *United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring). Even if the Fourth Amendment analogy were appropriate, it would only support Petitioner's claim that an illegal entry into a home presents a greater potential risk of physical injury than a curtilage intrusion.[13] Accordingly, under Respondent's own logic the likelihood of defense would have to be greater in the context of a private home than the curtilage of that home.

V. RESPONDENT'S INTERPRETATION OF THE ARMED CAREER CRIMINAL ACT RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

Even if Respondent's interpretation of § 924(e)(2)(B)(ii) were persuasive (and it is not), it raises serious constitutional concerns and should be rejected for that independent reason. Respondent claims that the "serious potential risk of physical injury" provision of the ACCA permits this element to be found by courts based on nothing more than the courts' "*commonsense judgments* based on *everyday experience* and cases that come before them." Resp. Br. 43 (emphasis added). Unfazed by the vagueness of this standard, Respondent asserts that Congress "left it to the courts" to define what sorts of offenses will fit within the "otherwise" clause. *Id.* at 42. Such a construction raises two serious constitutional questions. First, Respondent's proposal that courts use their "common[ ]sense" and "everyday experience" to define whether an offense poses a serious potential risk of physical injury to another calls for unadulterated judicial factfinding. Whether or not particular conduct is risky is *not* "a quintessential legal determination." Resp. Br. 42-43. It is rather a factual determination that requires a careful

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[13] An individual's expectation of privacy is at its peak in his or her home. *See Kyllo* v. *United States*, 533 U.S. 27, 34 (2001) (distinguishing expectation of privacy for interior of home from that for "curtilage and uncovered portions of residences"); *see also Payton* v. *New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house").

assessment of the surrounding circumstances. Cf. *Dunbar* v. *Jackson Hole Mountain Resort Corp.*, 392 F.3d 1145, 1149 (10th Cir. 2004) ("'whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination'"). Courts are completely unequipped to make such factual determinations—particularly when they involve the "risk" posed by unfamiliar state law crimes. Cf. *United States* v. *Golden*, No. 06-1326, 2006 WL 3019464, at *3-4 (7th Cir. Oct. 25, 2006) (Rovner, J. concurring) (noting lack of any record evidence to support court's conclusions about "actual risks" posed by predicate felony). Moreover, these type of facts are "too far removed from the conclusive significance of a prior judicial record," and more akin to the findings subject to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Shepard*, 544 U.S. at 25.

Respondent is certainly correct that the Eleventh Circuit did not "assess[] the facts specific to petitioner's prior conviction," Resp. Br. 42.[14] It did something far worse; it

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[14] Respondent's suggestion that the Eleventh Circuit could consider the presentence report to determine whether Respondent's conviction was sufficiently risky is inappropriate. Neither the District Court nor the Eleventh Circuit used a presentence report to make such a factual assessment. Moreover, Petitioner did object to the use of the attempted burglary conviction for enhancement purposes, JA 21, and that objection fully preserves his right to contest Respondent's proposal to rely on the assertions in the presentence report to prove the supposed "risk" of his actions. *See United States* v. *McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc).

Most importantly, "bureaucratically prepared, hearsay-riddled presentence reports," *United States* v. *Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part), are a far cry from the documents that *Shepard* allows to be considered to establish "the conclusive significance of a prior judicial record." *Shepard*, 544 U.S. at 25. A presentence report standing alone, without any evidence that its information derived from *Shepard*-appropriate document, is wholly insufficient to establish what facts were necessarily found when Respondent was convicted. *See McCall*, 439 F.3d 967, 974 (district court could not rely on presentence report that relied on sources not approved in *Taylor* or *Shepard*); *United*

assumed, based on no record at all, that Petitioner's conviction must have created a serious potential risk of physical injury to another. The fact that the Eleventh Circuit based this factual determination on its "common[ ]sense" rather than a developed record only exacerbates the constitutional difficulties posed by Respondent's interpretation of the statute.[15]

There is a reasonable, constitutional reading of the "otherwise" clause—that it encompasses offenses with an element requiring a serious potential risk of physical injury to another (such as reckless endangerment). See, *e.g.*, Ala. Code § 13A-6-24(a) (reckless endangerment requires finding of "conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat. § 11.41.250(a) (same); N.Y. Penal Law § 120.20 (same); Ariz. Rev. Stat. § 13-1201 (same).[16] Such an element-based reading of the

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States v. *Taylor*, 413 F.3d 1146, 1157-58 (10th Cir. 2005) (holding that presentence report that relied on police reports was not sufficiently reliable under *Shepard*).

[15] A second serious constitutional question is raised by Respondent's suggestion that Congress simply "left it to the courts" to define what offenses would qualify under the "otherwise" clause. Resp. Br. 42. Congress must define the elements of offenses and may not simply delegate the responsibility for defining the element of a crime to the courts. *See Mistretta* v. *United States*, 488 U.S. 361, 404 (1989).

[16] *See, e.g.*, 18 U.S.C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, *inter alia*, "creates a substantial risk of serious bodily injury to any other person"); Alaska Stat. § 11.61.150(a)(1) (defining crime of obstruction of highways to require proof of "a substantial risk of physical injury to others using the highway"); Ariz. Rev. Stat. § 13-2508 (defining "resisting arrest" as, *inter alia*, preventing an officer from effecting an arrest through "any ... means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code § 42400.3.(b) (criminalizing air pollution "that results in any unreasonable risk of great bodily injury to, or death of, any person"); Fla. Stat. § 1006.135(3) (defining hazing to require proof of "a substantial risk of physical injury or death to such other person"); N.Y. Penal Law § 145.45 (tampering with a consumer product in the first degree requires proof of "a

"otherwise" clause is consistent with the remainder of the statute and gives full effect to Congress' words.

If any doubt remains about whether attempted burglary convictions are predicate felonies under § 924(e)(2)(B)(ii), the rule of lenity requires such doubt to be resolved in favor of Petitioner. Under the rule of lenity, § 924(e)(2)(B)(ii) must be given its narrowest, most reasonable reading. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Even if there were any merit to Respondent's novel claim that judges may use their "experience" to decide which crimes are sufficiently risky to qualify under § 924(e)(2)(B)(ii) (and there is not), that interpretation is far less reasonable than the interpretation urged by Petitioner—that § 924(e)(2)(B)(ii) should be construed in accordance with fundamental canons of construction, and construed to avoid the serious constitutional questions presented by interpreting § 924(e)(2)(B)(ii) as a congressional delegation of authority for judges to make legislative determinations about what crimes pose what risks. Moreover, Respondent's position prevents the "fair warning" required of criminal statutes, as a person could only guess as to the type of offenses covered by an individual judge's use of her common sense and everyday experience. *Lanier*, 520 U.S. at 267. Accordingly, Petitioner's narrower interpretation must be adopted here.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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substantial risk of serious physical injury to one or more persons'); *id.* § 490.47 ("criminal use of a chemical weapon or biological weapon" requires proof of "a grave risk of death or serious physical injury to another person not a participant in the crime").

Respectfully Submitted,

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